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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 93-36
Tariff Filing Requirements	)	
for Nondominant Common Carriers	)	
	)	

COMMENTS OF
TELE-COMMUNICATIONS ASSOCIATION

Tele-Communications Association ("TCA"), by its attorneys, hereby submits its comments on the Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.[1] As TCA discusses below, the AT&T v. FCC decision and the instant proposals to further streamline the tariff filing process make it critical that the Commission adopt rules that ensure mutual enforceability of long-term, negotiated service agreements between users and long distance carriers.

I. INTRODUCTION

TCA is an association of telecommunications managers. Its members represent over one thousand small, medium and large users of telecommunications services, including state and local government agencies, corporations, and public and private hospitals and universities.

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[1] Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-96 (released Feb. 19, 1993).

As a result of the Commission's pro-competitive policies, TCA's members enjoy a wide variety of long distance services available from a large number of service providers. As in any competitive marketplace, telecommunications users often procure service by soliciting bids and negotiating with vendors to ensure that their unique requirements are adequately accommodated. The negotiation process may take three to twelve months, and the final deal is generally memorialized in a long-term service agreement that contains stabilized rates and customized terms and conditions.

In an unregulated marketplace, both parties would be bound by this service agreement. The vendor could not raise its rates or alter the material terms without committing an actionable breach. In the telecommunications industry, however, the carrier may engage in such actions with impunity, simply by filing a tariff that varies from the long-term service agreement. Except in rare circumstances, the tariff will take precedence, and the user will be bound to a much less attractive bargain.

Under forbearance regulation, tariff precedence, while troubling, was less of a concern because non-dominant

take effect on one day's notice, eliminate the ability of customers to object to tariffs that are inconsistent with underlying long-term service agreements. Consequently, TCA urges the Commission to take the measures discussed herein to make carrier-user agreements (involving either dominant or non-dominant long distance carriers) mutually enforceable, to the extent possible under the Communications Act.

II. THE COMMISSION SHOULD PROVIDE FOR MUTUAL ENFORCEABILITY

with underlying contracts to take effect unless the carrier can demonstrate "substantial cause" for the inconsistency.[3]

In practice, however, the substantial cause test has not been a significant evidentiary hurdle. For example, in the case that gave rise to the substantial cause requirement, the carrier filed a tariff with the Commission offering a ten year schedule of rates and conditions for satellite transmission services.[4] Only two years into the ten year period, the carrier filed a new tariff, which increased rates by 15 percent. In a series of rulings, the Commission determined that unforeseen events -- including inflation, loss of a satellite, and launch delays -- justified the rate increase.[5] Accordingly, even under the substantial cause test, a carrier may raise its negotiated rates simply because it experiences unanticipated cost increases.

B. The Tariff Precedence Doctrine Interferes With The Workings of the Competitive Interexchange Marketplace.

One of the Commission's guiding principles for the past decade has been to attempt to replicate the incentives and

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[3] See RCA American Communications, 86 F.C.C.2d 1197 (1981).

[4] Id. at 1198.

[5] RCA American Communications, Inc., 2 FCC Rcd 2363, 2367-68 (1987), aff'd sub nom., Showtime Networks, Inc. v. FCC, 932, F.2d 1 (D.C. Cir. 1991).

attributes of a competitive marketplace whenever possible.[6] To a considerable measure, the Commission has succeeded in these efforts. For example, its pro-competitive policies, in combination with the divestiture, have resulted in a competitive marketplace for many long distance services.

There remains one fundamental difference, however, between competition in the interexchange marketplace and in virtually any other market for goods and services: by virtue of the tariff precedence doctrine, IXCs can engage in conduct that would constitute a material breach of a commercial contract, yet still hold the customer to its end of a much less attractive bargain. This distinction seriously interferes with the workings of the marketplace.

As an initial matter, users are deprived of certainty that is essential in setting budgets and comparing bids from different service providers. In addition, users often assume that a negotiated interexchange service agreement functions like any other commercial contract, affording the user protection against changed terms as a matter of contract law. These unwitting users do not attempt to minimize their exposure to detrimental tariff revisions. Furthermore, users that are aware of tariff precedence are forced to expend time

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[6] See, e.g., Policy and Rules Concerning Rates for Dominant Carriers; Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, 2886 (1989) ("AT&T Price Cap Order").

and resources attempting to negotiate terms and conditions that minimize their exposure. Even if they are successful, these users may be forced to concede on other terms simply to secure rights that would be questioned in the commercial marketplace.[7]

C. The Commission Should Adopt Rules to Protect Users Against Tariffs That Abrogate Carrier-Customer Contracts

As a result of the AT&T v. FCC decision, all IXCs must file tariffs to reflect underlying long-term service agreements. If the instant proposals are adopted, many of those tariffs will take effect on one day's notice; most others (filed by AT&T) will take effect on 14 days' notice. In either event, users will have no realistic ability to object to tariffs that abrogate underlying long-term service agreements.

TCA fully supports streamlined regulation of competitive services. At the same time, however, it urges the Commission to recognize the potentially detrimental interplay of streamlined regulation and tariff precedence. To this end,

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[7] The Commission should recognize that a competitive marketplace alone does not ensure against unilateral changes in material terms. Long-term agreements generally contain provisions that require users to pay substantial penalties for early termination. Accordingly, even though the carrier risks alienating a customer or obtaining a reputation for unreliability, it may still be profitable to increase rates and hold the customer to the remainder of its service term.

TCA recommends that the Commission adopt the following requirements for the filing of dominant and non-dominant tariffs that would increase the rates or alter the material terms and conditions in underlying, negotiated long-term service agreements:[8]

First, carriers intending to file tariffs that are inconsistent with underlying long-term service agreements should be required to notify affected customers at least 15 days in advance of filing the tariff with the Commission. This pre-filing notice period will encourage carriers and customers to resolve the inconsistencies through private negotiation.

Second, carriers should be required explicitly to notify the Commission of any tariff filings that are inconsistent with underlying long-term contracts. Moreover, these filings should be made on 120 days' notice, in order to permit an adequate response by affected users. The Commission has authority to take this step under Section 203(b)(2) of the Communications Act.[9]

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[8] TCA would define material terms and conditions to include payment terms, liability provisions (of the carrier and the customer), service quality commitments (including credit allowances or penalties), termination provisions, term of service, discount levels, and installation and maintenance commitments. In particular cases, users should be permitted to demonstrate that other provisions are material.

[9] In order to satisfy legitimate expectations of rate stability, the Commission requires a 120-day notice period

(continued...)

Third, the Commission should suspend such filings for the full statutory period and require a detailed and compelling demonstration that the increased rates or changed terms and conditions are just and reasonable.[10] The Commission also should state, as it did with respect to above-cap filings, that tariffs that abrogate underlying contracts will be found lawful only in "rare instances, if any."[11]

Fourth, the Commission should provide that, if any such filing is allowed to take effect, the customer will automatically have the right to terminate the service agreement without liability, notwithstanding any tariff or contractual provision to the contrary. To be meaningful, the termination right must allow the customer to phase out service under the tariff for a reasonable period at the rates therein (rather than at the carrier's standard rates).

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[9](...continued)
for price cap tariffs that seek to increase rates above the Service Band Index (and that must, therefore, be supported by a substantial cause showing). 47 C.F.R. § 61.58(c)(3); see AT&T Price Cap Order, 4 FCC Rcd at 3103.

[10] Under price cap regulation, tariffs proposing above-cap rates must be accompanied by a detailed cost showing and will be suspended for the full five months permitted by the Communications Act. See 47 C.F.R. §§ 61.49(e), 61.58(c)(3).

[11] Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786, 6852 n.400.

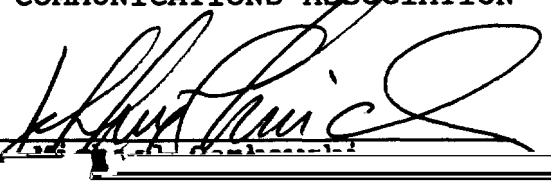
Fifth, the Commission should declare unlawful, pursuant to Sections 201(b) and 205, tariff filings that seek to abrogate commitments made in long-term tariffs not to modify the rates, terms and conditions therein.

III. CONCLUSION

For the foregoing reasons, TCA urges the Commission to adopt rules that promote the mutual enforceability of long-term, negotiated service agreements between carriers and customers.

Respectfully submitted,

TELE-COMMUNICATIONS ASSOCIATION

By: 

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 1993, I caused copies of the foregoing "Comments of Tele-Communications Association" to be hand-delivered to the following:

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